SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

E. E. ASHCRAFT AND JOHN WARE,

Petitioners,

vs.

STATE OF TENNESSEE,

Respondent

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT.

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INDEX

Subject Index

	Page
Motion for leave to file supplemental brief	1
Supplemental brief	3

Table of Cases Cited

Ashcraft v. *Tenn.*, 322 U. S. 143	4
Avery v. *Alabama*, 308 U. S. 444	6
Bram v. *U. S.*, 168 U. S. 532	3
Buchalter v. *N. Y.*, 319 U. S. 427	6
Lisenba v. *California*, 314 U. S. 219	4
McNabb v. *U. S.*, 318 U. S. 332	4
U. S. v. *Mitchell*, 322 U. S. 65	4

Authorities Cited

Constitution of the United States, 14th Amendment	5
Wigmore on Evidence, 3rd Edition, Section 821, Vol. 3, p. 238	4

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

MAY IT PLEASE THE COURT:

Comes the respondent, State of Tennessee, and moves the Court for leave to file a supplemental brief herein, copy of which accompanies this motion.

We realize that the Court desires all questions presented in the original brief but in the present case, this brief will be directed to a question not specifically raised by the petition for certiorari.

It was not until the oral argument of this case that the attention of counsel for respondent was directed to what seems to be the crucial question in the case, namely, whether the statements made by the petitioner Ashcraft were confessions or were as held by the Supreme Court of Tennessee exculpatory statements. There was no specific challenge on the part of the petitioners to this holding of the Supreme Court of Tennessee and while we do not insist such failure to specifically challenge its holding would

operate to deprive this Court of jurisdiction, we do insist that it furnishes some slight excuse for the neglect of counsel to realize the precise question upon which this Court granted the writ of certiorari.

Besides, due to unavoidable misadventure, counsel for respondent did not receive a copy of the printed transcript in this case until January 21, 1946, and the intervening time between that date and the date on which he was forced to come to Washington was hardly adequate to allow a full consideration of the questions presented.

WHEREFORE respondent prays leave to file its supplemental brief herein.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 381

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Respondent

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT

MAY IT PLEASE THE COURT:

This brief will be addressed to the sole question as to whether or not in cases coming to it from State Courts under the due process clause of the Fourteenth Amendment, it will impose upon State Courts the rule laid down by this Court in *Bram* v. *U. S.*, 168 U. S., 532, as to what constitutes a confession or whether in view of the conflict of authority upon this question hereafter mentioned, it will leave to the State Courts the privilege of adopting that view which such Courts may seem most suitable for their local problems.

I

Bram v. *U. S.*, *supra*, of course, came to this Court upon direct appeal from a judgment of conviction in a District Court of the United States. The present case, of course, does not come to this Court directly from a Court of the United States but comes to it under its power to review

judgments of State Courts allegedly in conflict with the due process clause of the Fourteenth Amendment. Between the powers of this Court in these two types of cases, the respondent respectfully insists that there exists a great gulf.

We concede that this Court has ample power and authority to adopt such doctrine as it may deem appropriate for the trial of cases in inferior courts of the United States, under its general supervisory powers of such Courts. But when a case be reviewed by this Court coming from a State Court where the claim be made that the due process clause has been infringed, the authorities indicate that the scope of review by this Court lies in a much more narrow compass and that its power is not so sweeping.

Lisenba v. *Cal.*, 314 U. S. 219, 236;
McNabb v. *U. S.*, 318 U. S. 332, 340;
U. S. v. *Mitchell*, 322 U. S. 65, 68;
See also Opinion by Mr. Justice Jackson in
Ashcraft v. *Tenn.*, 322 U. S. 143, 158.

II

While *Bram* v. *U. S.*, *supra*, does hold statements of the nature made by the petitioner Ashcraft in the present case to be confessions, the overwhelming weight of authority in the State Courts in this country is to the contrary. The cases are reviewed by Mr. Wigmore in the Third Edition of his work on Evidence, at Section 821, Vol. 3, p. 238. In the present case, the Supreme Court of Tennessee held directly that the statements in question were not confessions but were exculpatory statements or denials of guilt (Tr. p. 277). Mr. Wigmore is highly critical of the doctrine announced by this Court in *Bram* v. *U. S.*, *supra*., terming it "the height of absurdity in misapplication of the law."

We mention this conflict of authority upon the question to demonstrate that as to declarations and statements of

this type, the minds of reasonable men may well differ as to their nature. We now make no effort to determine which is the true rule. We do insist, however, that where the minds of reasonable jurists reach opposite conclusions as to the nature of statements of this type as must be true from the conflict in the decisions, the Fourteenth Amendment does not require this Court to impose the Federal rule in this case upon State Courts but should leave to such Courts in these border line cases the power to select that rule which best fits their local conditions.

To impose upon State Courts the rule announced by this Court in *Bram* v. *U. S., supra*, would result in each State being required to adopt the decisions of this Court in their entirety with reference to the admissibility of all statements and alleged confessions made by one held upon a criminal charge. But it has been expressly held by this Court that the Fourteenth Amendment leaves the several states free to adopt and enforce such rule as they may elect irrespective of that prevailing in the Federal Courts. See *Lisenba* v. *Cal., supra*, 236.

Again, in *McNabb* v. *U. S., supra*, and in *U. S.* v. *Mitchell, supra*, this Court was most careful to point out that the rule there announced with reference to the admissibility of statements made by the accused prior to arraignment were applicable only to the Federal Courts and that the State Courts might adopt such rule as they desired. We respectfully insist that this same grant of power should apply to the determination of questions of the type presented here where at least the weight of authority appears to be contrary to the decisions of this Court in *Bram* v. *U. S., supra*. A reference to the cases cited by Mr. Wigmore in the note to his text will disclose that a number of such cases hold declarations more incriminating than those in the case at bar exculpatory in nature and for that reason not confessions.

Another result to be anticipated from the application to State Courts of the holding in *Bram* v. *U. S., supra*, is that each time any statements of one upon trial for criminal offense be admitted in evidence, such admission will become reviewable by this Court under the due process clause by reason of the fact that such admission in evidence of such statement may conflict with a holding at the hands of this Court. This Court has said that the Fourteenth Amendment does not bring to the test of decision by this Court every ruling made by a State Court in the course of a criminal trial thereon. See *Avery* v. *Alabama*, 308 U. S. 444; *Buchalter* v. *N. Y.*, 319 U. S. 427. It would seem that the application of this rule would grant to the Courts of last resort of the several states the power to determine the nature of the statements of this type and that it does not require that they conform to a uniform standard.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 381.—October Term, 1945.

E. E. Asheraft and John Ware, Petitioners, *vs.* State of Tennessee. | Petition for a Writ of Certiorari to the Supreme Court of Tennessee.

[February 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

Mrs. Zelma Asheraft was murdered in Shelby County, Tennessee. The petitioner Ware was convicted for the murder. The petitioner Asheraft, husband of the deceased, was convicted for being an accessory before the fact. The Supreme Court of Tennessee affirmed the convictions. We reversed the judgment as to Asheraft, vacated it as to Ware, and remanded the case to the Supreme Court of Tennessee for further proceedings not inconsistent with our opinion. *Asheraft* v. *Tennessee*, 322 U. S. 143. The State Supreme Court then ordered the case remanded to the Criminal Court of Shelby County with the same directions as to further procedure. The petitioners were again convicted and the State Supreme Court affirmed.

Our reversal of Asheraft's first conviction was on the ground that his conviction resulted from a trial so conducted as to deprive Asheraft of due process of law in violation of the Fourteenth Amendment. At that trial the state had been permitted to introduce in evidence an alleged confession which had been obtained from Asheraft after thirty-six hours continuous grilling by investigating officers, who were holding him incommunicado in the County jail. This alleged confession was in large part written but Asheraft had neither written nor signed it. Ware's conviction had also rested on a confession, the admission of which as evidence he had challenged as a denial of due process. Without passing on the Constitutional question raised by Ware, we vacated the judgment against him for other reasons stated in our opinion. In the joint trial of both petitioners which resulted in the judgment now before us, the state again introduced Ware's confession. His objection to it, based on the due process clause was

overruled. Before reaching the issues raised by Ware, we shall dispose of the questions which Ashcraft now raises.

In our first opinion we pointed out in detail alleged incriminatory admissions used to convict Ashcraft and the circumstances under which he had made them. In summary those statements and circumstances were these. On a Saturday at 7:00 P.M., nine days after his wife was found dead, officers went to Ashcraft's home and took him to a fifth-floor county jail room. There he was held without rest or sleep until 7:00 o'clock Monday morning, or 36 hours. During the entire time Ashcraft was subjected to a constant barrage of questions and charges. According to the officers' testimony he, for about 28 hours, consistently denied any knowledge about, or complicity in, the crime. The officers swore, however, that after 11 P.M. Sunday night Ashcraft finally confessed that he knew who killed his wife, but at the same time denied that he had done it. According to this testimony Ashcraft said that Ware had come to his home before daylight, just as Mrs. Ashcraft was getting in an automobile to take a journey; that he watched Ware force Mrs. Ashcraft to drive the automobile away from home with Ware accompanying her; that Ashcraft, after making slight but ineffective protests went back to his room, later went to work, and that he made no report to the officers but kept his knowledge secret because he was afraid of Ware. Later on the Sunday night that Ashcraft was being interrogated in the jail, a court reporter was summoned and he, according to the evidence, took down complete confessions of guilt given both by Ware and Ashcraft. The reporter completed transcription of his notes about 7:00 o'clock Monday morning. These transcribed notes were offered as to both the petitioners in the first trial. Witnesses at that trial, including Ashcraft's doctor, also swore that both Ashcraft and Ware had been caused to strip for complete physical examinations. The only apparent purpose of this was to counteract any later claim by Ware or Ashcraft that their alleged confessions were the product of physical mistreatment.

At an early stage in the new trial, resulting in the conviction we are now reviewing, the prosecuting attorney announced that he intended to use this jail evidence again, "about everything but the confession." And that was done. The witnesses for the state in the first and the second trials were the same. Construing our mandate as prohibiting only the admission of the written un-

signed confession, the trial judge allowed the jury to listen to testimony narrating everything else that took place during the entire 36 hours Ashcraft was questioned with no one present but his inquisitors and those summoned by them to buttress their future evidence.

An inspection of the record shows beyond any peradventure of doubt that the testimony used in the last trial showing what took place during Ashcraft's examination might well have had the same practical effect on the jury the written unsigned confession might have had, had it been introduced. For the circumstances leading up to it were narrated in detail both with reference to Ware and Ashcraft. Even the doctor who examined Ware reported not only on Ware's physical condition but also testified in the same breath about his examination of Ashcraft.

Respondent claims that this testimony did not harm Ashcraft and that Ashcraft's supposed statement that he knew who killed his wife was exculpatory. In fact, in the context of this case, that statement was the strongest possible evidence against Ashcraft, who was charged with having been an accessory before the fact. For ten days following his wife's death, Ashcraft had purported to help the officers in their efforts to solve the crime, and for the first twenty-eight hours of his jail interrogation he had not only stoutly maintained his own innocence whenever it was questioned, but had also denied any knowledge whatever as to the identity of the murderer. To admit knowledge of the murder and of who committed it after these protestations by him would for most people be the equivalent of a confession of guilty participation in advance of the crime. Wilful concealment of material facts has always been considered as evidence of guilt. And statements denying guilt followed by a confession of knowledge of who the guilty person was may carry the strongest implications of a guilty knowledge. Cf. *Bram* v. *United States*, 168 U. S. 532, 562. This is particularly true where a husband admits that he has, against the strongest pressures, deliberately concealed the identity of his wife's murderer for ten days.

We see no relevant distinction between introduction of this statement and the unsigned alleged confession, except the possibility that the admission of this long-concealed knowledge was perhaps a more effective confession of guilt than the written unsigned alleged confession would have been. All the reasons given for reversal of the judgment against Ashcraft in the first case, which we need not repeat, apply with equal force here.

The state has asked that if Ashcraft's case is reversed we follow the same course as to Ware that we did in the first case, and vacate the judgment against him. For this reason, as well as the reasons given in our former opinion, we do not pass on the Constitutional question raised by Ware concerning his alleged confession, but vacate the judgment of the Supreme Court of Tennessee affirming Ware's conviction.

We need not now decide other questions that have been argued except one contention mentioned below.[1]

The judgment against petitioner Ashcraft is reversed and that against petitioner Ware is vacated. Both cases are remanded to the State Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice FRANKFURTER joins in this opinion on the basis of the decision in *Ashcraft* v. *Tennessee*, 322 U. S. 143.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

[1] The petitioner Ashcraft contends that in the oral argument before this Court, when the first conviction was being challenged, the state's attorney admitted that the confession was the only evidence against Ashcraft, and since we mentioned this fact in our opinion, our mandate and the state Supreme's Court's mandate, which adopted our mandate, in effect forbade a new trial of petitioner. We do not think our mandate lends itself to such an interpretation. As to the State Supreme Court's mandate, that Court has construed it by affirming petitioners' second convictions. The state Court's construction of its own mandate is final.